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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| LEANNA J. TAYLOR,<br><br>Plaintiff/Counterdefendant/Appellant,<br><br>v.<br><br>BILL BARNETT LIMITED LIABILITY LIMITED PARTNERSHIP and WILLIAM G. BARNETT, SR.,<br><br>Defendants/Counterclaimants/Appellees. | 2 CA-CV 2008-0100<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CV-20060080

Honorable Peter J. Cahill, Judge

AFFIRMED

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P E L A N D E R, Chief Judge.

**¶1** In this case involving disputes over real property rights, plaintiff/appellant Leanna Taylor appeals from the trial court's judgment, entered after a bench trial, in favor of defendants/appellees Bill Barnett LLLP and William G. Barnett, Sr. (collectively Barnett). Taylor contends the trial court erred in: (1) ruling her predecessor in interest had abandoned an express roadway easement over part of Barnett's property and rejecting her claim of easement by necessity; (2) ordering Taylor to remove a fence she had placed in a five-foot strip on Barnett's property that she allegedly acquired through adverse possession; and (3) denying her motion to admit her proffered, late-discovered evidence when the court previously had permitted Barnett to introduce at trial untimely disclosed evidence. We affirm.

**Background**

**¶2** We view the facts in the light most favorable to sustaining the trial court's judgment. *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 148, 920 P.2d 26, 28 (App. 1996); *Knapp v. Wise*, 122 Ariz. 327, 328, 594 P.2d 1023, 1024 (App. 1979). There are three parcels of land involved in this case. Barnett acquired Lot 18 in Pine, Arizona in 1989 and transferred it to Bill Barnett LLLP in 2002. Taylor owns the other two parcels, Lots 17 and 19, which both adjoin Lot 18 and form a backward "L" shape around it. Taylor acquired her properties from her great aunt, Rolettea Taylor (Aunt Rolettea), in 2000. The

northern boundary of Taylor's Lot 19 adjoins the southern border of Barnett's Lot 18. Her Lot 17 is directly east of and adjacent to Lot 18 and the northern part of Lot 19.

**¶3** In March 2006, Taylor filed this action, seeking declaratory and injunctive relief on two contested strips of property. First, she sought a permanent injunction allowing her road access along an easement that had been granted to her predecessor on the northern part of Lot 18. Barnett filed a counterclaim, alleging Taylor's predecessor had abandoned the easement, thus causing the property interest to revert to him. Second, Taylor sought declaratory relief on her claimed right to construct a fence in a five-foot strip on the southern edge of Barnett's property that adjoins the northern boundary of Lot 19. Aunt Rolettea had deeded that strip of land to Barnett's predecessor in 1961, when he built a wood cabin that encroached on the northern edge of her property. In 2000 or 2001, Taylor started building a fence in the strip, which she claimed to have acquired through adverse possession.

**¶4** After a two-day bench trial, the trial court found in favor of Barnett, concluding the express roadway easement had been abandoned, thus reverting the property interest to Barnett. Regarding the strip of land where Lots 18 and 19 meet, the court determined that Taylor had failed to show she acquired it through adverse possession. The court denied all of Taylor's claims and granted an injunction in favor of Barnett, requiring Taylor to remove the fence, enjoining her from constructing another one, and ordering her to discontinue use of the road on Lot 18. This appeal followed the court's entry of final judgment.

## Discussion

### I. Roadway easement

**¶5** In 1958, in a written instrument, Barnett's predecessor granted to Taylor's predecessor an easement over a twelve-foot strip of land on the northern edge of Lot 18 for purposes of access to Lot 17. The recorded easement document stated, "in order to obtain ingress and egress to and from the lands above [Lot 17] conveyed to Grantee, it is essential to pass over and through the adjoining property of Grantor." The document also provided, "if said roadway at any time hereafter is abandoned by the Grantee, said parcel of land described herein shall revert to the Grantor and all right, title, interest or claim . . . shall be extinguished."

**¶6** Aunt Rolettea purchased Lot 19 in 1957 and Lot 17 in 1964. When she bought Lot 17, the easement was "re-granted" to her and recorded a second time. The road in question does not follow a straight line along the twelve-foot easement. Rather, the road meanders through the northwestern part of Lot 18, to the north onto property not owned by any party to this action, and then in a general easterly direction through the twelve-foot easement.

**¶7** In 1978 and 1979, Aunt Rolettea filed two complaints seeking to enjoin the owners of Lot 18 from preventing or blocking her access to the easement. Both complaints were dismissed without prejudice for failure to prosecute, and Aunt Rolettea told the owner of Lot 18 at that time, Lee Barrett, that she was going to "drop[]" the lawsuit and would "no

longer . . . persist in trying to cross" his property. In a 1980 deposition, Aunt Rolettea testified she had used the easement from 1964 to 1968 but stopped doing so when some large boulders, mounds of dirt, a wood pile, and a planted garden appeared and prevented her from accessing the road. In addition, Barnett's son testified at trial about having further obstructed the easement in 1989, when he placed non-permanent horse corrals there until about 1998.

**¶8** The road was used infrequently, if at all, while Aunt Rolettea owned the properties, and it later became unrecognizable as a roadway. In addition, there is an alternate, southern road that provides access to Lot 17, but it runs across property owned by another person who is not a party to this action. At some point Taylor had a portion of the easement road in question on the northern edge of Barnett's property leveled and Barnett later noticed that "someone had bull dozed a road across" the area.

**¶9** After the bench trial below, the trial court found:

> the easement was abandoned; the rights to use the right-of-way easement became "extinguished," just as exactly was provided for in the instrument conveying the easement. Neither Taylor nor her predecessors in title re-acquired an interest in the roadway easement. . . . [and] any rights to the easement not abandoned were lost by adverse possession long ago.

Taylor challenges that ruling on several grounds. First, she contends the roadway easement could not have been conveyed to Barnett without a written instrument pursuant to A.R.S. § 33-401. Second, she argues that, because the obstructions were neither continuous nor permanent, the trial court erroneously concluded Barnett had acquired the easement through adverse possession, and that Barnett's claim to recover the easement was time-barred

pursuant to A.R.S. §§ 12-521(A) and 12-526. Finally, Taylor maintains her predecessor did not abandon the easement because "[i]nfrequent use of the express roadway easement does not result in an abandonment."

**A. Abandonment**

**¶10** We first address Taylor's argument that her predecessor could not have abandoned the roadway easement absent a written instrument pursuant to § 33-401. Barnett responds that statute "is inapplicable to the abandonment of an easement right since abandonment does not involve the transfer of an interest in land, but the termination of an interest." We review de novo questions of statutory interpretation and application. *Chaurasia v. Gen. Motors Corp.*, 212 Ariz. 18, ¶ 24, 126 P.3d 165, 173 (App. 2006). We agree with Barnett.

**¶11** Section 33-401(A) requires an "estate of inheritance, freehold, or for a term of more than one year, in lands or tenements" to be conveyed in a written instrument. But an abandonment results in the "extinguishment" of the easement, not conveyance of a property interest. *See Bayless Inv. & Trading Co. v. Bekins Moving & Storage Co.*, 26 Ariz. App. 265, 271, 547 P.2d 1065, 1071 (1976); *see also Faulconer v. Williams*, 936 P.2d 999, 1002 (Or. Ct. App. 1997) (easement may be extinguished "by consent, by prescription, by abandonment, by merger, or, if it is an easement by necessity, by the cessation of the necessity"). And an easement may be extinguished by prescription, which does not require a written instrument. *See* §§ 12-521(A)(1), 12-526 (party may acquire title through adverse

possession); *Spaulding v. Pouliot*, 218 Ariz. 196, ¶ 24, 181 P.3d 243, 250 (App. 2008) (principles of prescriptive easement and adverse possession applied interchangeably). As Barnett points out, Taylor concedes this point in her other arguments, in which she seeks title to property through adverse possession, prescription, or necessity without any formal writing conveying an interest to her. Thus, we do not find § 33-401 applicable to extinguishment of an easement.

**¶12** Next, we address whether the record and law support the trial court's finding that Taylor's predecessor had abandoned the easement because, if that finding stands, we need not address Taylor's arguments about prescription.[1] We "review the evidence in a manner most favorable to sustaining the judgment" and will not disturb the court's ruling if there is any reasonable evidence to support it. *Inch v. McPherson*, 176 Ariz. 132, 135, 859 P.2d 755, 758 (App. 1992); *see also Sabino Town & Country Estates*, 186 Ariz. at 148, 920 P.2d at 28; *Chandler v. Jackson*, 148 Ariz. 307, 311, 714 P.2d 477, 481 (App. 1986). "We are bound by the trial court's findings of fact, unless they are demonstrated to be clearly erroneous, although not by the trial court's conclusions of law." *Chandler*, 148 Ariz. at 311, 714 P.2d at 481; *see also* Ariz. R. Civ. P. 52(a).

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[1]Taylor seemed to assert at oral argument in this court that her predecessor in interest acquired through adverse possession a continued right to use, or perhaps an ownership interest in, the roadway easement. That argument, however, is waived because it was not made in her opening brief. *See Mitchell v. Gamble*, 207 Ariz. 364, ¶ 16, 86 P.3d 944, 949-50 (App. 2004). In addition, Taylor cites no evidence in the record to support her new argument. *See* Ariz. R. Civ. App. P. 13(a)(4), (6).

**¶13** The trial court ruled that Taylor's predecessor had abandoned the easement and that, according to the clear language of the written instrument granting the easement, the property interest reverted to Barnett. To the extent we are required to interpret that document, our review is de novo. *See Squaw Peak Cmty. Covenant Church of Phoenix v. Anozira Dev., Inc.*, 149 Ariz. 409, 412, 719 P.2d 295, 298 (App. 1986) (interpretation of written easement is question of law reviewed de novo). But to the extent the court's ruling on abandonment hinged on factual findings, we must defer if any reasonable evidence supports them. *Inch*, 176 Ariz. at 135, 859 P.2d at 758.

**¶14** Generally, an easement is not abandoned by mere non-use. *See Squaw Peak*, 149 Ariz. at 414, 719 P.2d at 300 ("The law is well-settled that the owner of an easement created by express grant is under no duty to make use of the easement in order to retain his entitlement."); *see also Heg v. Alldredge*, 137 P.3d 9, 14-15 (Wash. 2006) (alternate access and non-use insufficient for abandonment); *Netherlands Am. Mortg. Bank v. E. Ry. & Lumber Co.*, 252 P. 916, 918 (Wash. 1927); *Tract Dev. Servs., Inc. v. Kepler*, 246 Cal. Rptr. 469, 476 (App. 1988). Rather, abandonment occurs "when there is a history of non-use, coupled with an act or omission showing a clear intent to abandon." 25 Am. Jur. 2d *Easements & Licenses* § 98 (2004); *see also City of Tucson v. Koerber*, 82 Ariz. 347, 356, 313 P.2d 411, 418 (1957) (Abandonment is "an intent[] to abandon, together with an act or an omission to act by which such intention is apparently carried into effect.").

**¶15** Taylor asserts infrequent use of the easement and alternate access are insufficient to support a finding of abandonment. In response, Barnett maintains "the volume of evidence show[ed] that through non-use of the Easement coupled with an alternate access route as well as allowing the Easement to fall into disrepair, [Taylor's] predecessor in interest manifested sufficient intent to abandon the Easement." Barnett points to the multiple obstructions, the vegetation overgrowth, the need to level and remove dirt from the easement, and use of the alternate southern access road as demonstrating an intent to abandon. In addition, evidence below established the road was basically unrecognizable from 1980 to 2000, and Barnett's son testified he had not seen anyone use the easement while he lived on Lot 18 in the 1990s.

**¶16** In its post-trial ruling, the trial court did not expressly address the question of whether Taylor's predecessor, Aunt Rolettea, had intended to abandon the easement. But evidence in the record clearly supports an implicit finding that she did. And we may affirm a trial court's ruling if correct on any ground supported by the record and the law. *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992); *see also Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9, 130 P.3d 538, 540 (App. 2006).

**¶17** Aunt Rolettea acknowledged in her 1980 deposition that when she was forced to use the southern road in 1968, she stopped using the northern easement from then until at least 1980. Barnett's predecessor stated in a deposition that when Aunt Rolettea told him she was dropping her lawsuit, she said "she was no longer going to persist in trying to cross [his]

property." Aunt Rolettea's comments, combined with her decision to allow dismissal of the prior lawsuits, the thirty-year period of non-use of the roadway easement, the general disrepair of the road, and the multiple, longstanding obstructions in it, are circumstances from which the trial court could infer she had intended to abandon the easement. *See Friedman v. Town of Westport*, 717 A.2d 797, 799-800 (Conn. App. 1998) (abandonment determined from surrounding circumstances); *O'Connor v. Kaufman*, 616 N.W.2d 301, 310 (Neb. 2000) (same); 25 Am Jur. 2d *Easements & Licenses* § 98; *see also Koerber*, 82 Ariz. at 356, 313 P.2d at 418 (intent to abandon easement "may be manifested or inferred from the act").

**¶18** The trial court apparently credited the evidence favoring Barnett, and we must defer to the court's credibility determinations and its weighing of the evidence. *See John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, ¶ 37, 96 P.3d 530, 542 (App. 2004). Because substantial evidence supports the court's finding that the roadway easement had been abandoned or "extinguished," we have no basis for disturbing that ruling. That conclusion, in turn, obviates the need to address Taylor's arguments as to why Barnett failed to establish adverse possession of the roadway easement or the trial court's alternative finding that "any rights to the easement not abandoned were lost by adverse possession long ago." *See Osterkamp*, 172 Ariz. at 193, 836 P.2d at 406.

**B. Easement by necessity**

**¶19** Taylor alternatively argues, as she did below, an easement by necessity was created. The trial court considered that argument but concluded Taylor had failed to demonstrate the northern road was necessary to access Lot 17. Again, we review the court's legal conclusions de novo but defer to its factual findings unless clearly erroneous. *Chandler*, 148 Ariz. at 311, 714 P.2d at 481; *Hale v. Amphitheater Sch. Dist. No. 10*, 192 Ariz. 111, ¶ 5, 961 P.2d 1059, 1062 (App. 1998). We find no error.

**¶20** The right to take private property for use as a right-of-way derives from article II, § 17 of the Arizona Constitution. *Bickel v. Hansen*, 169 Ariz. 371, 374, 819 P.2d 957, 960 (App. 1991). Section 12-1202(A), A.R.S., provides:

> An owner of . . . land . . . which is so situated with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity over, across, through, and on the premises, may condemn and take lands of another, sufficient in area for the construction and maintenance of the private way of necessity.

"Absolute necessity is not required." *See Chandler Flyers, Inc. v. Stellar Dev. Corp.*, 121 Ariz. 553, 554, 592 P.2d 387, 388 (1979); *see also Solana Land Co. v. Murphey*, 69 Ariz. 117, 125, 210 P.2d 593, 598 (1949). Rather, "the standard for imposing an easement of necessity is whether such an easement is required in order to provide reasonable access to the property." *Chandler Flyers*, 121 Ariz at 554, 592 P.2d at 388. And parties seeking condemnation have the burden of proving "they lack an adequate alternative outlet." *Tobias v. Dailey*, 196 Ariz. 418, ¶ 8, 998 P.2d 1091, 1093-94 (App. 2000).

**¶21** Taylor maintains "the only safe way" to access Lot 17 by vehicle is through the northern easement because the southern roadway seasonally floods, and the easement is the only route by which a propane truck can access Lot 17. In response, Barnett refers to the trial court's findings that Taylor's predecessor had accessed Lot 17 by the southern road for many years and that the cost of improving it to allow a propane truck or other vehicles to pass did not justify imposing an easement by necessity on Barnett's lot.

**¶22** The trial court's finding that the southern road provided reasonable, alternate access to Lot 17 is not clearly erroneous. *See Chandler*, 148 Ariz. at 311, 714 P.2d at 481. Testimony at trial, which the court found persuasive, established that a vehicle could reach Lot 17 by using the southern roadway. And Aunt Rolettea acknowledged in her deposition that she had used the southern road when the northern easement was blocked, except when it was flooded. Although it may be more convenient for Taylor to use the northern road easement, convenience and advantage are not sufficient reasons for establishing an easement by necessity, even where the alternate route would cost more, is longer, or less direct. *See Bickel*, 169 Ariz. at 374, 819 P.2d at 960; *see also Siemsen v. Davis*, 196 Ariz. 411, ¶ 24, 998 P.2d 1084, 1090 (App. 2000). Rather, an easement by necessity is not established "'unless there is no other passable way or the expense [is] prohibitive.'" *Siemsen*, 196 Ariz. 411, ¶ 24, 998 P.2d at 1090, *quoting State ex rel. Carlson v. Superior Court*, 181 P. 689 (Wash. 1919).

**¶23** Therefore, as the trial court correctly stated, the fact that repairs to the southern road will be necessary "is not sufficient legal justification for the taking of property owned by another." Taylor did not present evidence that upgrading the southern road would be cost prohibitive or that that road, if improved, would be unusable during floods. Thus, the court did not err by concluding Taylor failed to meet her burden of showing the inadequacy of the alternate route and, therefore, was not entitled to an easement by necessity. *See id*. ¶ 11.

**II. Five-foot strip of land**

**¶24** The second area of property in dispute is a five-foot strip ("the strip") of land located where Lots 18 and 19 abut. In 1961, Aunt Rolettea deeded the northernmost, five-foot strip of Lot 19 to the owners of Lot 18. At that time there was a barbed wire fence on the strip. Taylor testified Aunt Rolettea had stored building and roofing materials, metal sheeting, a "camp trailer," and other objects against that fence until Taylor removed them in 2000. Either that same year or the next, Taylor began replacing the barbed wire fence with a sturdier fence made of rock and wood.

**¶25** In 2003, Barnett had a survey conducted and determined the fence was being constructed on his property. At trial, the surveyor testified the new fence was placed diagonally and did not follow the boundary line between the two parcels. After Taylor filed this action, Barnett filed a counterclaim, alleging a continuing trespass and seeking an injunction requiring her to stop building and remove the fence. The trial court found in favor of Barnett and granted the injunction.

**¶26** Taylor maintains she acquired the five-foot strip through adverse possession.[2] "A party claiming title to real property by adverse possession must show that his or her possession of the property was actual, visible, and continuous for at least ten years and that it was under a claim of right, hostile to the claims of others, and exclusive." *Spaulding*, 218 Ariz. 196, ¶ 25, 181 P.3d at 250; *see also* § 12-521(A)(1); *Rorebeck v. Criste*, 1 Ariz. App. 1, 3-4, 398 P.2d 678, 681 (1965). The party seeking title has the burden of proving adverse possession by clear and convincing evidence. *Inch*, 176 Ariz. at 135, 859 P.2d at 758; *see also Whittemore v. Amator*, 148 Ariz. 173, 175, 713 P.2d 1231, 1233 (1986). The trial court did not err in concluding "there was insufficient evidence to support this claim."

**¶27** Taylor argues Aunt Rolettea's placement of junk, building materials, and a mobile camper next to the old barbed wire fence was an open, notorious use of the five-foot strip and, as a matter of law, she acquired it through adverse possession. According to Taylor, Aunt Rolettea acquired title to the strip in 1971, ten years after she conveyed it to Barnett's predecessor in 1961. At trial, Taylor testified that the camper had been next to the

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[2]Incorrectly citing § 12-521(A), Taylor contends Barnett's challenge to her ownership of the strip is time-barred because she adversely possessed the property more than ten years ago. *See* § 12-526(A) (claims for recovery of land from person having adverse possession must be commenced within ten years after cause of action accrues). On appeal, however, that argument was first adequately made in her reply brief and, therefore, is waived. *See Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 502, 851 P.2d 122, 127 (App. 1992). And, in any event, we conclude the trial court did not err in finding unproven by clear and convincing evidence Taylor's adverse-possession claim as to that portion of the property on which she began to construct the new fence.

fence for at least thirty years and that Aunt Rolettea had placed other junk there. Taylor's father testified he had helped Taylor remove "tons" of junk from the strip in 2000.

**¶28** The trial court, however, could have found neither Taylor's nor her father's vague testimony about the placement of junk "next to the fence" constituted clear and convincing evidence of actual, open, and continuous use of the strip in question. *See Inch*, 176 Ariz. at 135, 859 P.2d at 758. The testimony was not clear about whether the old fence or the materials were within the five-foot strip or where the materials were stored between 1961 and 1971. Nor was the testimony clear on the portion of the old fence to which the witnesses referred. Moreover, a neighbor testified, and Taylor's father agreed, the materials began accumulating in the 1950s and were not removed until 2000. But Barnett's son testified there was no "junk or anything else piled next to the fence" in the early 1990s. From the evidence as a whole, albeit conflicting and confusing, the trial court reasonably could infer that the type and location of materials stored at or near the old wire fence had not changed significantly during the decades leading up to the 1990s, the time frame of Barnett's son's observations.

**¶29** We do not weigh conflicting evidence on appeal. *Whittemore*, 148 Ariz. at 175, 713 P.2d at 1233. Rather, we "will examine the record only to determine whether substantial evidence exists to support the action of the court below" and will not disturb the trial court's factual findings unless clearly erroneous. *Id*.; *Sabino Town & Country*, 186 Ariz. at 148, 920 P.2d at 28. Here, the court weighed the witnesses' testimony and implicitly

found the testimony of Barnett's son more reliable. His testimony established that junk had not been piled next to the fence, and photographs admitted at trial supported his testimony. Therefore, the court did not err in concluding Taylor had not presented clear and convincing evidence of adverse possession. *See Inch*, 176 Ariz. at 135, 859 P.2d at 758.

**¶30** Taylor next contends the trial court erred in finding she had constructed the new fence on Barnett's property because her "unrefuted" testimony established that she built the new fence closer to her property line than the old fence. In its ruling, the court compared a photograph of the fence area taken in 1999 with a photograph taken after Taylor constructed the new fence in 2001. The court determined "the new fence was built farther north than the old fence-line" and Taylor's construction of the fence was a continuing trespass on Barnett's property.

**¶31** Contrary to her contention, Taylor's testimony on this subject was not unrefuted. Barnett testified Taylor had constructed the new fence closer to his building on Lot 18, whereas the old wire fence had been placed five to six feet south of the structure. Similarly, his son testified the wire fence used to be six to seven feet south of the building when he lived there in the 1990s. Their testimony was consistent with that of a neighbor who testified the old wire fence was approximately five feet from the building in the 1950s. Taylor's testimony to the contrary merely created a factual dispute, subject to the trial court's credibility determination, to which we must defer on appeal. *See John C. Lincoln Hosp.*, 208 Ariz. 532, ¶ 37, 96 P.3d at 542. Therefore, based on the Barnetts' trial testimony and the

photographic evidence, we do not find the trial court's factual findings and its related rejection of Taylor's adverse possession claim clearly erroneous. *See Chandler*, 148 Ariz. at 311, 714 P.2d at 481.

**III. Denial of motion to admit late discovered evidence**

**¶32** Last, Taylor contends the trial court prejudicially erred in excluding her "late-discovered photographic evidence." We review a court's rulings on the admission or exclusion of evidence for a clear abuse of discretion, *Link v. Pima County*, 193 Ariz. 336, ¶ 3, 972 P.2d 669, 671 (App. 1998), and find none here.

**¶33** More than a month after the bench trial ended, Taylor moved "to extend disclosure" and admit ten photographs she discovered after trial. She asked the court to extend her the same courtesy it had given Barnett, when it allowed him to introduce four photographs first disclosed on the second day of trial. Barnett stated at that time he did not know of the existence of the photographs until they had recently fallen out of a storage box. When the court admitted the untimely disclosed photographs as exhibits, it did so with a "cautionary statement," noting first it failed to see the value of the photographs and, second, if Taylor "is moving around any boxes and any more photos fall out of those boxes, what's good for the defendant, ought to be good for the [p]laintiff." When Taylor later moved to introduce the photographs she found a month after trial, however, the court summarily denied her motion.

**¶34** On appeal, Taylor asserts "it is manifestly unjust to deny" her request to admit photographs post-trial when the trial court had allowed Barnett to admit untimely disclosed photographs at trial. Taylor does not challenge the court's decision to admit Barnett's photographs, but rather only the court's refusal to similarly admit her photographs. In the trial court, Taylor cited Rule 37(c)(3), Ariz. R. Civ. P., in her motion to expand discovery. That rule allows a party to disclose information for the first time during trial if it meets certain conditions. But here, Taylor sought to introduce newly discovered evidence more than a month after the trial had ended. Both parties had rested their cases and were preparing written closing arguments, pursuant to the trial court's direction. Admitting new evidence long after trial would have prevented Barnett from challenging the authenticity of the photographs or cross-examining Taylor on them. And, although the court previously indicated it might be willing to consider other photographs if newly found, Taylor's motion, made fifty-five days after trial, clearly was untimely. *See* Ariz. R. Civ. P. 26.1(b)(2); Ariz. R. Civ. P. 37(c)(3). Therefore, the trial court did not abuse its discretion in denying her motion. *See Link*, 193 Ariz. 336, ¶ 3, 972 P.2d at 671.

**IV. Attorney fees and costs**

**¶35** Citing Rule 21(c), Ariz. R. Civ. App. P., and A.R.S. §§ 12-341 and 12-341.01(C), Barnett seeks an award of attorney fees and costs incurred on appeal. Although Barnett is entitled to recover his costs, we deny the request for fees because we do not find, nor does Barnett point to, any clear and convincing evidence that Taylor's claims constitute

harassment, are groundless, and were not made in good faith. § 12-341.01(C). *See Chavarria v. State Farm Mut. Auto. Ins. Co.*, 165 Ariz. 334, 340, 798 P.2d 1343, 1349 (App. 1990).

**Disposition**

**¶36** The trial court's judgment is affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge